Remarks

Claims 1-3, 5-12, and 14-16 remain pending in the application.

The Office Action rejects claim 1, 2, 6-12 and 15 as obvious over Nageo, et al., Japanese Patent 7059553 in view of Matsuura, et al, Japanese Patent 10262641, and the webpage entitled "How to Homebrew Sake" (Homebrew), under the assertion that Nageo discloses sake, and contacting the sake with finely divided fruit and subjecting the sake to rapid pasteurization, and that Homebrew teaches the addition of citric acid to sake. The examiner further asserts that pulp is the same as finely divided fruit.

The examiner's reliance on the HOMEBREW webpage as prior art is not supported. The article was evidently procured from the Wayback Machine, as indicated by the URL from which the Examiner asserts its March 11, 2000 date. However, there is little reason to believe that the article was a printed publication just because the Wayback Machine automatically, through an unknown computerized process, assigned a file name including an apparent date to a cached webpage. The web page could have been cached at any time, and the annotation on the bottom of the page is mere hearsay statement of a machine, and bears no indication of reliability. As indicated in the declaration of K. David Crockett, Esq., the Wayback Machine is clearly inaccurate. Mr. Crockett demonstrates that the Wayback Machine wrongly assigns dates that are years earlier than the actual dates of web pages, comparing web pages which he controls, the known date of alterations, and the incorrectly assigned date according to the Wayback Machine. Clearly, the Wayback Machine does not reliably indicate a date of a

reference. Furthermore, this application was filed in 2002, and there is no indication that the Wayback Machine was searchable at that time. There is no indication that the Homebrew webpage was accessible over the internet at that time, other than the demonstrably unreliable URL code assigned by the Wayback Machine.

The relevant case law places the burden on the sponsor of prior art "printed publications" to prove that the reference is indeed a printed publication. An electronic publication, including an on-line database or Internet publication, is considered to be a "printed publication" within the meaning of 35 U.S.C. § 102(a) and (b) provided the publication was accessible to persons concerned with the art to which the document relates. Thus, "whether information is printed, handwritten, or on microfilm or magnetic disk or tape, etc., the individual who wishes to characterize the information as a printed publication... should produce sufficient evidence of its dissemination or that it has been otherwise available and accessible to persons concerned with the art to which the document relates..." Wyer, 655 F.2d 221 at 227 (CCPA 1981). In the case of the Homebrew webpage, there is no reliable evidence that the webpage was accessible to the art prior to the critical date.

To the contrary, there is evidence that the Examiner retrieved the webpage through a hindsight process that indicates that the authenticity and proper dating of the webpage was overlooked. First, the Examiner found a current webpage relating to sake, which may have been accessible with current search engines. Then, the Examiner resorted to the Wayback Machine and entered a currently accessible URL, and selected from the "archived" pages a suitable page which predated the

critical date. This is exactly the process used by Mr. Crockett to obtain the "2002" webpage indicating that content that he did not post until 2005 was present on a web page three years earlier. Crockett Dec. ¶ 3. Clearly, the applicant has demonstrated that the Homebrew page is not a printed publication, and was likely not in existence on the date asserted by the examiner.

Even if the date of origination of the Homebrew webpage is correct (there is little reason to believe that it is, given the known propensity of the Wayback Machine to assign dates to web pages that are years before the web pages come into existence), there is no indication that the webpage was accessible to the art at the time of invention. The web page is accessible only if one enters search terms gleaned from the claims, and there is no other index that would lead one in the art to the reference. Google currently provides 113,000,000 hits for a search of sake. An unindexed collection of 113,000,000 references cannot be said to meet the accessibility requirements for printed publications. Should the Examiner disagree with the Applicant, the Applicant requests disclosure as to the search mechanisms and search terms used to uncover the current Homebrew webpage, so that any counter-assertion that it qualifies as a printed publication may be addressed.

The examiner has not identified a motivation to add acid to sake of Nageo, where Nageo has already added acid from the plums. The redundancy would seem unnecessary, and nothing in the cited references suggests that the acid component of Nageo is in any way inadequate. While the examiner may have identified the components in the art, no motivation has been suggested, and it is clear in all food arts that the mere fact that a portion of some ingredient is good does not mean that a

double dose is better. Adding more chocolate to a chocolate chip cookie recipe is good (almost without limit), but merely doubling the salt is disastrous, notwithstanding the numerous beneficial chemical functions which salt provides in the complex chemistry and material structure of the cookie. Clearly, the motivation that applies to adding chocolate does not apply to the addition of salt. Likewise, the motivation of adding more of any compound or class of compounds does not apply in numerous culinary arts. Specifically, the motivation to add more acid to sake already acidified does not exist. Numerous other counterexamples can be envisioned, but still the Examiner has not provided a motivation to establish a prima facie case of obviousness.

The Examiner incorrectly assumes that finely divided fruit is the same as fruit pulp. This is clearly wrong. Any decent cook understands that finely divided foods taste and react differently than crushed foods. Whether speaking of crushed garlic versus minced garlic, mashed potatoes versus diced potatoes, or crushed grapes versus diced grapes, the release of chemicals from the food, and the subsequent reaction of the foods with other constituents of the final product are known to differ considerably. Applying the winemaking art for what it is worth, the Applicant is certain that the Examiner appreciates that no one of ordinary skill in the art would make wine with finely divided grapes. The Examiner's basis for equating pulp with finely divided fruit is not expressed in the office action, but is contrary to the knowledge of one skilled in the art.

Specifically regarding sake, the use of pulp in sake will release numerous undesirable particulates, and result in excess dissolution of compounds that result in excessive cloudiness, unwanted coloration, and undesirable taste, consistency, and

texture components. On the other hand, the use of finely divided fruit will release acid and pectin from the fruits along with desired flavor profile, while minimizing release of particulates and undesirable features and compounds. The difference appears in the resultant sake as predominantly fruit-flavored sake with improved flavor and character profile (i.e., improved flavor, aroma, color, texture, consistency, and viscosity) when divided fruit is used, rather than sake with undesirable flavor and character profile when pulp is used. The preferred embodiment, as expressed in the specification, calls for infusion of sake with fruit, and this entails steeping the fruit in the liquid so as to extract the soluble ingredients (per Webster's College Dictionary). It makes no sense to infuse sake with pulp, because mere addition of the pulp will release all the constituent compounds of the pulp, which also results in sake that lacks a desired flavor and character profile. The claimed method allows for infusion and extraction of some, but not all, constituents of the divided fruit, followed by removal of essentially all fruit solids, while the Examiner's proposed equivalent results in the release of all constituents of the pulp, and great difficulty in removing fruit solids, and these processes are clearly not the same to one of skill in the art.

The Office Action rejects claim 5 and 14 as obvious over Nageo in view of Matsuura and the Homebrew webpage, under the assertion that Winemaker teaches the addition of sulfites, and that sulfite would have been an obvious alternative. Winemaker is almost entirely irrelevant to sake brewing. The complex chemistry of grape processing and the interactions with additional chemicals is a mysterious art even among winemakers (this fact is generally known), and it is clear that the mere fact that sulfite addition works to create palatable and stable chemistry in a limited class of wines provides no suggestion

that it will create a palatable and stable chemistry in sake, or that it is helpful to resolve any problem encountered in sake production. Sulfites are not even helpful in white wine production, from which the Examiner could express a teaching not to use sulfites in sake, so that the sulfite teaching from wine is perfectly neutral. The chemistry of sake and the numerous constituents to taste are quite different from the chemistry of wine, and this fact is so well known in the sake art that no one in the art would be motivated to adopt winemaking techniques to sake. It is not even obvious to <u>try</u> sulfites in sake, but if it were, it clearly would not be obvious that the combination would work and provide a palatable and chemically stable sake and not react with other constituents to spoil or adulterate the sake.

Conclusion

This response has addressed all of the Examiner's grounds for rejection. The rejections based on prior art have been traversed. Reconsideration of the rejections and allowance of the claims is requested.

Date: April 14, 2006 By: Kamran Fattahi

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